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# In the Supreme Court
OF THE
# United States

OCTOBER TERM, 1945

No. 951

KOA GORA, *Petitioner,*

vs.

TERRITORY OF HAWAII, *Respondent.*

**PETITION FOR WRIT OF CERTIORARI**
**to the United States Circuit Court of Appeals**
**for the Ninth Circuit.**

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**PETITION FOR WRIT OF CERTIORARI**
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**for the Ninth Circuit.**

*To the Honorable Harlan Fiske Stone, Chief Justice of the United States, and to the Honorable Associate Justices of the Supreme Court of the United States:*

Petitioner, Koa Gora, respectfully prays for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit to review the final judgment of said court, entered January 4, 1946, affirming the judgment of the Supreme Court of the Territory of Hawaii.

**OPINIONS BELOW.**

The opinion of the Supreme Court of the Territory of Hawaii is contained in the record. (R. 30-38.) The opinion of the Circuit Court of Appeals in affirming the judgment is also contained in the record. (R. 60-66.) No opinion was rendered by the Circuit Court of Appeals in denying a petition for rehearing on February 1, 1946. (R. 67.)

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**SUMMARY STATEMENT OF THE MATTER INVOLVED.**

Petitioner was convicted in the Circuit Court of the First Judicial Circuit of the Territory of Hawaii of violating section 6253 of the Revised Laws of Hawaii, 1935. (R. 53.) The section, as amended by the Session Laws of Hawaii, 1941, pp. 249-260, provided:

> "Any man or woman who is guilty of lewd conversation, lascivious conduct, or libidinous solicitations, shall be punished by imprisonment of not more than one year or by a fine not exceeding one thousand dollars ($1000.00), or by both such imprisonment and fine."

The accusation against petitioner was in this language:

> "That Koa Gora, at Honolulu, City and County of Honolulu, Territory of Hawaii, on the 6th day of July, A.D. 1943, did do that which was lewd and lascivious in conduct, contrary to section 6253 of the Revised Laws of Hawaii, 1935." (R. 32, 52, 61.)

Petitioner did not demand a bill of particulars. On conviction, he was sentenced to imprisonment for six months. (R. 40-43.) His writ of error to the Supreme Court of the Territory of Hawaii challenged the cryptic accusation as repugnant to the Fifth and Sixth Amendments to the Constitution of the United States. (R. 31-32.) The court ruled against him. (R. 38.) Petitioner repeated the challenge (R. 3-5) on appeal to the Circuit Court of Appeals for the Ninth Circuit in accordance with section 128 of the Judicial Code. (28 U.S.C.A., sec. 225.) Again the court ruled against him. (R. 62-64.) That court also ruled that petitioner had waived the right of challenge by his failure to demand a bill of particulars. (R. 63.)

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**JURISDICTION.**

Jurisdiction of this court is invoked under section 240 (a) of the Judicial Code. (28 U.S.C.A., sec. 347.)

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**QUESTIONS PRESENTED.**

1. Was the accusation against petitioner repugnant to the Fifth and Sixth Amendments to the Constitution of the United States?

2. Did petitioner waive the right to challenge the accusation by failing to demand a bill of particulars?

**REASONS RELIED ON FOR ALLOWANCE OF THE WRIT.**

**(1) The decision of the Circuit Court of Appeals is in conflict with the decisions of this court and with its own decisions on an important question of constitutional law.**

The accusation against petitioner was that on a specified day at a specified city he *"did do that which was lewd and lascivious in conduct"*. This was the equivalent of an accusation that on a specified day at a specified city he committed "the form of immorality which has relation to sexual impurity". (*Swearingen v. United States,* 161 U.S. 446, 16 S.Ct. 562, 563.) Does an accusation of such character satisfy the mandate of the Fifth Amendment to the Constitution that "no person shall * * * be deprived of * * * liberty * * * without due process of law", and the mandate of the Sixth Amendment to the Constitution that "in all criminal prosecutions, the accused shall enjoy the right * * * to be informed of the nature and cause of the accusation"?

The application of those amendments to civil and criminal cases in the Territory of Hawaii, may not be doubted.

*Farrington v. T. Tokushige,* 273 U.S. 284, 299, 47 S.Ct. 406, 409, 71 L.Ed. 646.

*Lovato v. New Mexico,* 242 U.S. 199, 37 S. Ct. 107, 108, 61 L.Ed. 244.

*Callan v. Wilson,* 127 U.S. 556, 8 S.Ct. 1301, 32 L.Ed. 223.

Repeatedly, this court has said that the constitutional mandates of the said amendments are not satis-

fied unless an accusation is direct, positive, certain, and particular.

*Evans v. United States,* 153 U.S. 584, 14 S.Ct. 934, 936, 38 L.Ed. 839.

*United States v. Cruikshank,* 92 U.S. 542, 557-8, 23 L.Ed. 588, 593.

Repeatedly, this court has also said that the constitutional mandates of the said amendments are not satisfied unless an accused is so informed of the nature and cause of the accusation that he may meet it and prepare for trial, and after judgment be able to plead the record and judgment in bar of a further prosecution for the same offense.

*Wong Tai v. United States,* 273 U.S. 77, 80-1, 37 S.Ct. 300, 71 L.Ed. 549.

And repeatedly, this court has further said that the constitutional mandates of the said amendments are not satisfied unless the accusation is in due form under a certain and unambiguous law defining the crime.

*Lanzetta v. State of New Jersey,* 306 U.S. 451, 453, 59 S.Ct. 618, 619, 83 L.Ed. 888.

*United States v. L. Cohen Grocery Co.,* 255 U. S. 81, 89-92, 41 S.Ct. 298, 300-1, 65 L.Ed. 516.

In accord with the authorities last cited is the decision of the Circuit Court of Appeals for the Ninth Circuit in *Simmons v. United States,* 119 F. (2d) 539, 544.

That the accusation against petitioner did not satisfy the said constitutional mandates, is obvious.

The accusation was not direct, or positive, or certain, or particular. It did not inform him of the nature and cause of the accusation, for it did not inform him of specific accusers, specific accusatory circumstances, or a specific offense coming within the general definition of "lascivious" conduct, or immoral conduct having relation to sexual impurity. At best, the form of accusation made could only prompt speculation in the mind of an accused as to what conduct on his part during each and every moment of the day specified might, in the opinion of his accusers, whoever they were, be regarded as "lascivious". At best, the form of accusation would force any accused to trial not knowing who his accusers were, not knowing what specific accusations were made, and not knowing what defense to prepare.

Moreover, an accusation thus framed is intolerable to the doctrine of double jeopardy. If, after having once been acquitted or convicted on an accusation thus framed, an accused is again faced with an accusation in the same language, he cannot determine whether he is being prosecuted for the same offense. He must proceed to trial in darkness, and if enlightenment comes at all it must come only after such trial is completed.

Again, the Hawiian statute under review is not a certain and unambiguous law defining the crime of "lascivious conduct". That phrase fixes no immutable standard of guilt. The standard is left to the variant views of different courts and juries. All must speculate as to the meaning of the phrase. What may

be considered as immorality relating to sexual impurity in one case may not be so considered in the next. In each case the standard is locked up until the trier of facts applies the key. The repugnancy of the phrase to the constitutional mandates discussed, is obvious.

**(2) The decision of the Circuit Court of Appeals is in conflict with the decisions of this court and with its own decisions on an important question of criminal law.**

By the decision in the present case the Circuit Court of Appeals for the Ninth Circuit determined that petitioner had waived his right to challenge the accusation by failing to demand a bill of particulars. This was plain error, for if an accusation be repugnant to the due process of law clauses, "specification of details of the offense would not serve to validate it".

*Lanzetta v. State of New Jersey,* 306 U.S. 451, 453, 59 S.Ct. 618, 619, 83 L.Ed. 888.

In *Foster v. United States,* 253 F. 481, the Circuit Court of Appeals for the Ninth Circuit said, at page 483:

> "The bill of particulars could not avail to cure the defect of the indictment."

And in *Collins v. United States,* 253 F. 609, the same court said, at page 610:

> "It should be premised that a bill of particulars can in no way aid or render sufficient an indictment fundamentally bad. * * * The bill of particulars, therefore, filed by the prosecuting attorney, can in no way aid the sufficiency of the indictment."

## CONCLUSION.

Wherefore, petitioner respectfully prays that a writ of certiorari be issued to the United States Circuit Court of Appeals for the Ninth Circuit and that the final judgment of said court in said cause be reviewed and reversed.

Dated, San Francisco, California,
March 11, 1946.

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